92-660

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

ENVIRONMENTAL LIFESTYLES, INC., an Arizona corporation; MICHAEL SHOTEY,

Petitioners,

v.

LINDA EALES and EALES & ASSOCIATES, INC.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I

WHETHER 17 U.S.C. 101, AS AMENDED IN 1990, APPLIES TO RESPONDENTS' ARCHITECTURAL PLANS IN WHICH RESPONDENT CLAIMS NO PROTECTION IN THE DESIGN OF THE PLANS, BUT THE STRUCTURAL CHANGES MADE FROM A PREEXISTING SET OF ARCHITECTURAL PLANS.

PARTIES OF THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Environmental Lifestyles, Inc., an Arizona corporation, and Michael Shotey, and Respondents, Linda Eales and Eales & Associates, Inc., have been parties to this litigation from the beginning.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

THE NINTH CIRCUIT COURT OF APPEALS WRONGFULLY REFUSED TO APPLY A RECENTLY ENACTED FEDERAL STATUTE WHICH CLARIFIES THAT RESPONDENTS' ARCHITECTURAL PLANS DO NOT QUALIFY FOR COPYRIGHT PROTECTION 3

CONCLUSION 6

APPENDIX A-1

TABLE OF AUTHORITIES

Page

STATUTES:

17 U.S.C. Section 101 .....2, 3

TEXTS:

1 *Nimmer on Copyright*, Section 2.08[D][2] 5

No. _____

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To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals in *Eales v. Environmental Lifestyles, Inc., et al.*, Docket Number 90-16455, was not reported and appears in Appendix A-1. The order of the Ninth Circuit Court of Appeals denying petitioner's petition for review of the above order was entered on June 1, 1992, and appears at Appendix A-12.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Ninth Circuit was dated and entered on March 5, 1992. Petitioner's petition for rehearing was filed March 27, 1992, and the order denying the petition was entered June 1, 1992. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. *17 U.S.C. Section 101.*

An "architectual work" is defined as the design of a building as embodied in any tangible medium of expression, including a building, architectural plans or drawings.

STATEMENT OF THE CASE

Respondents brought a copyright infringement action against petitioners in the United States District Court of Arizona on April 25, 1988. Jurisdiction was exclusive pursuant to 28 U.S.C. 1338(a). The matter was tried before the court sitting without a jury on November 2, 1989. On July 23, 1990, the trial court granted respondents judgment against petitioners, finding that respondents had copyright protection in their architectural plans, and that petitioners had infringed on the copyright.

On August 28, 1990, judgment for respondents was entered awarding damages against petitioners in the amount of $57,218.00.

On September 27, 1990, petitioner appealed the trial court's judgment to the United States Court of Appeals for the Ninth Circuit. Oral argument was heard on November 7, 1991, and on March 5, 1991, the Ninth Circuit Court of Appeals rendered its opinion affirming the judgment of the district court.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT COURT OF APPEALS REFUSED TO APPLY A RECENTLY ENACTED FEDERAL STATUTE WHICH CLARIFIES THAT RESPONDENTS' ARCHITECTURAL PLANS DO NOT QUALIFY FOR COPYRIGHT PROTECTION.

A. 17 U.S.C. 101.

This statute was amended pursuant to the Architectural Works Protection Act of 1990 to specifically define what elements of an architectural work are copyrightable. Pursuant to the statue, an architectural work:

> is the DESIGN of a building as embodied in any tangible medium of expression, including a building, ARCHITECTURAL PLANS OR DRAWINGS.

17 U.S.C. 101 (emphasis added).

In its opinion, the Ninth Circuit stated:

> Because this case involves a claim of infringement of copyrighted plans, not a structure, the Architectural Works Protection Act of 1990, Pub.

> L. No. 101-650, 104 Stat. 5089 Title VII, is inapplicable. See 1 *Nimmer on Copyright*, 2.08[D][2], at 2.114, n. 163.4.

Opinion, page 2210, note 2.

First, the amended statute expressly includes architectural plans in the definition of "architectural works," regardless of what *Nimmer* says.

Secondly, the citation of *Nimmer* has no application because the statement of *Nimmer*, when read in its entirety, simply reaffirmed that the Architectural Works Protection Act does not deprive architectural plans of copyright protection:

> With amendment of the 1976 Act by the BCIA in 1988, any lingering doubt about the inclusion of architectural plans within the scope of U.S. copyright was dispelled. The BCIA substitutes 'diagrams, models, and technical drawings, including architectural plans' for the previously quoted formula – 'technical drawings, diagrams, and models' – in the statutory definition of 'pictorial, graphic, and sculptural works.' As stated by the framers of the BCIA, this emendation merely codifies existing law on this subject, so the law as to decennial architectural works is the same as that pertaining to those created during the Berne era . . .
>
> Interestingly, this amendment does both too much and too little. To the extent it merely codifies existing practice, it does too much for an avowedly minimalist approach to implementing the Berne Convention. To the extent that the Berne Convention envisions protection for three-dimensional buildings, the amendment does too little. Congress redressed that latter

> defect in a later amendment. IT SHOULD BE NOTED THAT NOTHING IN THAT LATER AMENDMENT, THE ARCHITECTURAL WORKS COPYRIGHT ACT, AFFECTS PROTECTION FOR ARCHITECTURAL PLANS, DRAWINGS AND MODELS . . .

1 *Nimmer on Copyright*, Section 2.08[D][2], at 2.116, n.163.4.

This quote was taken entirely out of context. The act specifically addressed the question of just what is protectable in an architectural work (the answer being, of course, the design), which is exactly the issue in this matter. The statute could not be more applicable, and the Ninth Circuit bypassed the most crucial aspect of petitioner's appeal before it.

B. Respondents' Architectural Plans.

Respondents readily admitted that they created their architectural plans based upon the design of another set of plans created by another architect. They admitted that their plans were a derivation of the preexisting work of this other architect, and that they did not obtain the consent to use the design. They profess only to copyright protection in the "structural elements" of her derivative plans. (Opening Brief, pages 4-5).

CONCLUSION

Petitioners appealed to the Ninth Circuit Court of Appeals because the Architectural Works Protection Act of 1990 clarified that it is the design of either plans or a structure which is protectable, and not the functional or structural elements contained therein. Respondents' plans, which copied the design from a previous set of plans, should not have qualified for copyright protection as the changes made by respondents were structural, as she denied any design rights in her plans. The Ninth Circuit Court of Appeals shockingly held the Architectural Works Protection Act of 1990 inapplicable to the issues, while in reality the new act clarifies petitioners' argument that respondents' plans do not qualify for copy right protection.

Petitioners respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

/s/ Michael Shotey
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Petitioners Pro Per

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDA D. EALES and EALES & ASSOCIATES, INC., *Plaintiffs-Appellees,* v. ENVIRONMENTAL LIFESTYLES, INC., an Arizona Corporation; MICHAEL SHOTEY; et al., *Defendants-Appellants.*	No. 90-16455 D.C. No. CV-88-00651-RCB OPINION

Appeal from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge, Presiding

Argued and Submitted
November 7, 1991 – San Francisco, California

Filed March 5, 1992

Before: Cecil F. Poole, Stephen Reinhardt and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Poole

SUMMARY

Intellectual Property

Affirming a district court judgment, the court of appeals held that an architect's architectural home plans

were entitled to copyright protection, infringement of which warranted award of actual damages.

Linda D. Eales, an architect, entered into a contract for the preparation of architectural plans for a residential housing development. The contract stated that the plans could not be assigned without her permission. although the housing development failed, construction was completed using Eales' plans on a lot sold to third parties. Appellant Environmental Lifestyles, Inc., never contacted Eales to ask her permission to use her plans in the construction of this home. Eales' had effectively copyrighted the construction drawings used on that home. Eales brought an action for copyright infringement, seeking compensatory and punitive damages, and an injunction restraining further infringement. The district court entered judgment for Eales and awarded actual damages.

[1] The court rejected the argument that the architectural plans were not entitled to copyright protection because they lacked originality, were an unprotectable idea, or an unlawful derivation of a pre-existing work. [2] It is settled law that architectural drawings and plans are eligible for protection under the copyright code as material, graphic, or sculptural works. Eales' plans were no exception to this general rule. [3] The originality requirement does not demand that the author add novelty to the work, but that it be the result of independent creation. [4] while the copyright statutes do not allow an author to obtain a monopoly on an idea itself, an expression of an idea can be protected. Eales properly won damages because defendant copied the plans she drew, not the idea she created.

[5] Eales was entitled to the lost fair market value of the architectural plans. [6] She was also entitled to all profits attributable as the defendants' infringement of her copyright and to any ascertainable indirect profits she would have made on the house if she had sold it herself.

COUNSEL

Leighton P. Clark, Phoenix, Arizona, for the defendants-appellants.

John L. Dillingham, Dillingham, Keilp & Cross, Phoenix, Arizona, for the plaintiffs-appellees.

OPINION

POOLE, Circuit Judge:

Environmental Lifestyles, an Arizona real estate developer, and its officer Michael Shotey appeal a judgment in favor of the plaintiff, an architect, in this copyright infringement case. The defendants contend that the plaintiffs' architectural plans were not entitled to copyright protection and that even if they were the district court miscalculated actual damages and improperly awarded the plaintiffs lost profits. We affirm.

FACTS AND PROCEEDINGS

Wen-Clay, a homebuilding and real estate developer, hired the California architectural firm of Corbin, Yamafuji and Associates (CY) to prepare construction plans and drawings for model homes and homes for resale, both to

be built at a development called "The Greens" near the Gainey Ranch area of Scottsdale, Arizona. After CY prepared a set of plans, Wen-Clay obtained a building permit for the construction of the homes from the Scottsdale government. CY's plans, however, were designed for construction of homes in California: the plans included features that would make the homes more likely to withstand earthquakes, and there were other indicators that CY did not draw the plans with the idea of building in Arizona in mind. Accordingly, a Wen-Clay executive contact plaintiff Linda Eales, an architect and designer, and inquired about adapting the plans for use in Arizona. Wen-Clay was concerned that the plans would entail excessively high building costs and wanted to be sure that the plans conformed to the Scottsdale building code.

Eales, who during this time operated as both a sole proprietor and then in the corporate form as Eales & Associates, Inc., inspected the Greens building site with representatives of Wen-Clay. Model homes had been started on the site, but only one had partially constructed walls and none had been constructed beyond slabs and footings. After concluding that the CY plans were not compatible with Wen-Clay's desire to construct homes compatible with the Arizona climate and its own architectural style preferences, Eales reported that the plans would have to be changed. Wen-Clay accordingly stopped construction on the model homes so that it could review the plans. Shortly thereafter, Wen-Clay retained Eales to prepare construction drawings for all of the model homes at the Greens.

Eales specifically retained ownership in the construction drawings when she agreed to prepare them for Wen-

Clay's use and agreed with Wen-Clay in the contract that the plans could not be assigned without her permission. However, she did not seek the permission of CY to use its plans in constructing the homes at the Greens site. Instead, Eales returned the CY drawings to Wen-Clay and prepared her own construction drawings based upon a temporary Wen-Clay construction brochure and the necessity for creating plans compatible with the existing "footprints" of the then-existing models, including slabs, footings, elevator shafts, location of rooms and garages, and plumbing systems.

After completing these revised plans, Eales submitted them to the City of Scottsdale for a building permit. The city concluded that they differed sufficiently from the CY plan to require a full, on-site plan check. The city eventually issued the required building permit for the Greens development. During the fall of 1986, however, Wen-Clay's financial problems induced it to half construction of the Greens development.

In May or June 1986, Donald and Anne MacKenzie bought lot 156 at the Greens development and decided several months later that they desired plan #3 to be built upon the site. Mr. MacKenzie had been negotiating with defendant Shotey for the construction of a pool on the property and discovered in November 1986 that Shotey had a contractor's license. Shotey had a contractor's license. Shotey had never before constructed a home. Shotey's company, defendant Environmental Lifestyles, Inc., was engaged in pool construction and landscape construction work at the Greens. Nevertheless, MacKenzie began discussing with Shotey the possibility that Shotey would build the home since Wen-Clay was no

longer in business.[1] On January 26, 1987, MacKenzie and Shotey agreed that Shotey would build a house conforming to plan #3 on lot 156.

Dennis Legere, a construction supervisor in Wen-Clay's employ for several years, was familiar with Eales' construction drawings. He had built several homes based upon such plans in the past and had used them regularly in building the model homes at the Greens development. He also knew that the CY plans, which he had seen, were not sufficient to construct any of the models. Legere contracted with Shotey and Environmental Lifestyles to become construction superintendent on the MacKenzie project on lot 156 in February 1987. Construction was completed in August of that year.

Neither Wen-Clay, Environmental Lifestyles, Shotey, Legere or MacKenzie ever contacted Eales to ask for permission to use her plans in constructing the MacKenzie home. Eales discovered that her plans were being used in the construction at lot 156 after hearing Shotey describe the home and confronting Legere at the construction site. Shotey, Environmental Lifestyles, and Legere, however, all knew that Eales' plans for model #3

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[1] Defendant Michael Shotey contends that he sought repayment of money owed him by Wen-Clay, and that to settle this debt he agreed orally with Wen-Clay executive Roy Wensel to accept the Eales plans for model #3 at the Greens site as full satisfaction. However, the district judge concluded that "there is a serious question whether any such agreement ever existed" and that Shotey "had no reason to need [the Eales construction] plan" at the time he allegedly settled the Wen-Clay debt in this manner. Appellants E.R. at 92 (Findings of Fact at 6, Number 22).

were being used to build a home on lot 156. In fact, Legere sent a letter to the Scottsdale building department informing them that Wen-Clay had given Environmental Lifestyles permission to use plan #3 in building the lot 156 house. Eales' plans for model #3 had been machine copied by Environmental Lifestyles vice-president Kurt Dobson, Shotey, or Legere, but the title block (a margin space on the plan drawings indentifying [sic] the architect) had been removed.

On April 28, 1987 Eales wrote to Shotey, Environmental Lifestyles, Legere and Mr. MacKenzie's company, Mac-West Investments, Inc. informing them that the plans were being used without her permission and demanding her usual fee of $4.00 per square foot for a custom home together with an invoice for $11,968.00, which would be the resulting fee for the 2,992-foot MacKenzie home. None of the recipients of the letter responded to it.

On November 6, 1987 Eales' copyright registration for the plan #3 construction drawings became effective. Eales had never publicly distributed her plan #3 working drawings and took all necessary steps to inform Environmental Lifestyles, Shotey, Mac-West, and Legere of her ownership interest in the plans. The CY plans which had initially been commissioned by Wen-Clay for use at the Greens development were apparently never copyrighted. Shotey, Environmental Lifestyles and Legere all were aware of Eales' copyright claim on the plan #3 drawings before they commenced construction on the MacKenzie home.

MacKenzie paid $201,750 for the home on lot 156. The cost of constructing the home was $141,000 and

Legere was paid $12,500 plus 60% of the difference between $146,000 and the actual cost of the home if under that figure, or $3,000, for a total of $15,500. Legere's fee was not included in the cost of constructing the home; accordingly, the total cost of the residence was $156,500. Environmental Lifestyles and Shotey thus earned $45,250 profit on the construction of the MacKenzie home.

Eales sued Environmental Lifestyles, Shotey, Legere, and MacKenzie for copyright infringement on April 28, 1988. She sought compensatory and punitive damages and an injunction restraining further infringement. On August 17, 1990, the district court for the District of Arizona, after a bench trial, entered judgment in favor of Eales and awarded her actual damages of $11,968 and profits of $45,250, for a total sum of $57,218. The court held that Legere was entitled to indemnification from Environmental Lifestyles and Shotey for $11,968 in damages and ruled that MacKenzie was not liable for any damages suffered by Eales, Shotey and Environmental Lifestyles timely appealed.

STANDARD OF REVIEW

The factual findings that underlie the district judge's conclusions of law are reviewed for clear error. *McCullough v. Price*, 823 F.2d 316, 318 (9th Cir. 1987). The district court's calculation of damages is also subject to clear error review. *Abend v. MCA, Inc.*, 868 F.2d 1465, 1480 (9th Cir. 1988), *aff'd*, 110 S.Ct. 1750 (1990). This court has jurisdiction pursuant to 28 U.S.C. § 1291.

DISCUSSION

[1] Defendants Shotey and Environmental Lifestyles contend that the district court improperly found copyright protection for Eales' construction plans. They assert as grounds for this assertion that Eales' plans lack originality, are an unprotectable idea, and constituted an unlawful derivation of a pre-existing work. None of these arguments are meritorious. Shotey and Environmental Lifestyles also contend that the district judge incorrectly calculated damages. This contention is also without foundation.

I. Validity of Eales' Copyright

A. Originality

In order to properly receive copyright protection, Eales' drawings must be original. *United States v. Hamilton*, 583 F.2d 448, 450 and n.2 (9th Cir. 1978). Defendants argue that this requirement is not met because Eales' plans fit under the copyright code's "useful article" exception and do not substantially differ from the earlier drawings prepared by CY. Both of these arguments are meritless.

[2] The "useful article" exception of the copyright code would prevent Eales from copyrighting her plans if they "hav[e] an intrinsic utilitarian function that [does] not merely . . . portray the appearance of the article or . . . convey information." 17 U.S.C. § 101; *see Mazer v. Stein*, 347 U.S. 201, 218 (1954). The intrinsic function of an architectural plan is to convey the information necessary to enable the reader to construct a building. It is settled

law that architectural drawings and plans are thus eligible for protection under the copyright code as "pictorial, graphic, [or] sculptural works." 17 U.S.C. §§ 101, 102(a)(5); *see, e.g., Robert R. Jones Assoc. v. Nino Homes*, 858 F.2d 274 (6th Cir. 1988); *Imperial Homes Corp. v. Lamont*, 458 F.2d 895 (5th Cir. 1972); *Demetriades v. Kaufman*, 680 F. Supp. 658 (S.D.N.Y. 1988). Eales' plans are no exception to this general rule.[2]

[3] Defendants' assertion that Eales' plans do not qualify for copyright protection because they are "substantially similar" to the drawings prepared by CY is also unpersuasive. The originality requirement does not demand that the author add "novelty" to the work; it requires only that the plans "display something irreducible, which is one man's alone, not that the work be novel in comparison with the works of others." *Hamilton*, 583 F.2d at 451 (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903)). The originality requirement is met when the work is the result of independent creation. *Sid & Marty Krofft Television, Inc. v. McDonalds Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977). The defendants, do not dispute that Eales did not copy the CY plans and that she created the layout of the model home without consulting the CY drawings.

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[2] Because this case involves a claim of infringement of copyrighted plans, not a structure, the Architectural Works Protection Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 Title VII is inapplicable. *See* 1 *Nimmer on Copyright* § 2.08[D][2], at 2. 114 n. 163.4 ("The Architectural Works Protection Act . . . does not affect protection for architectural plans, drawings and models as pictorial, graphic, or sculptural works.").

B. The "Idea-Expression" Distinction

[4] Defendants next argue that Eales' plans do not qualify for copyright protection because they are an unprotectable idea. This argument is also meritless. While the copyright statutes do not allow an author to obtain a monopoly on an idea itself, an *expression* of an idea can be protected. *See Baker v. Selden*, 101 U.S. (11 Otto.) 99 (1879). Eales' plans laid out the location and sizes of numerous features of model home #3, and thus her ideas was "fixed" in tangible form. That is all the copyright code requires. *See* 17 U.S.C. § 102(a); *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1463 (5th Cir. 1990) ("[P]rotection is extended to an expression of an idea fixed in tangible form, but not to the idea itself regardless of the form in which it is fixed."). Eales won damages because defendants copied the plans she drew, not the idea she created.

II. Damages

Defendants argue that the district judge improperly calculated the damages and profits awarded Eales. This contention lacks merit. The copyright code allows the award of compensatory damages and infringer's profits. 17 U.S.C. § 504(b); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 512 n.5 (9th Cir. 1985) (*Frank I*).

[5] Eales is entitled to the lost fair market value of the architectural plans. *See Frank I*, 772 F.2d at 512; *Nucor Corp. v. Tennessee Forging Steel Service, Inc.*, 513 F.2d 151, 153 n.3 (8th Cir. 1975). In calculating this figure, the court is to determine "what a willing buyer would have been

reasonably required to pay a willing seller for plaintiff's work." *Frank I*, 772 F.2d at 512. The district court properly applied this test, and substantial evidence supported the finding that Eales could have earned $11,968 by selling the plans. Defendants offer no evidence sufficient to cast doubt on this figure.[3]

[6] Eales is also entitled, to all profits attributable to the defendants' infringement of her copyright and to any ascertainable indirect profits. *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1550 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 1321 (190) (*Frank II*); *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1023 (9th Cir. 1985). In calculating the direct profits resulting from the defendents' [sic] infringing use of Eales' plans, the district judge correctly used as a measure the amount of profits Eales would have made on the house if she had sold it herself.[4] *See Russell v. Price*, 612 F.2d 1123, 1123

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[3] Specifically, Shotey and Environmental Lifestyles have not demonstrated that Eales' ordinary fee was not $4 per square feet or that the size of the finished MacKenzie home was not 2,992 square feet.

[4] 17 U.S.C. § 504(b) allows a copyright plaintiff to recover its actual damages and the profits earned as a result of an infringing use to the extent that they are "not taken into account in computing actual damages." This provision, which is designed to prevent a plaintiff from recovering twice for the same damages, bars a plaintiff from recovering in the form of damages the profits it could have made from selling the infringing item in competition with the infringer and the profits gained by the infringer from its use of the copyrighted item. *See, e.g., Abeshouse v. Ultragraphics, Inc.*, 754 F.2d 467, 470-71 (2d Cir. 1985); *Taylor v. Metrick*, 712 F.2d 1112, 1120 (7th Cir. 1983). Because Eales is not in the business of selling her services as a homebuilder, defendants cannot complain about the profit

(9th Cir. 1979) ("It is clear from a reading of the statute that the infringer's profits to which the copyright proprietor may be entitled consist of the . . . sale *profits from the infringing use of the plaintiff's work*. . . . ") (emphasis added); *Robert R. Jones Assoc. v. Nino Homes*, 858 F.2d 274, 281 (6th Cir. 1988); *see also, e.g., Aitken, Hazen et al. v. Empire Constr. Co.*, 542 F.Supp. 252, 262-63 (D. Neb. 1982) (awarding revenues lost when developer illegally copied architectural plans and profits earned when infringer used them to build an apartment complex).[5]

While the district judge's findings of fact do not indicate the basis for its conclusion as to the costs of constructing the home, it is the defendants' burden to prove up their deductible costs. *Transgo*, 768 F.2d at 1024. Any doubt as to the correctness of the profit calculation should therefore be resolved in favor of the plaintiff, *See Stevens Linen Assoc. v. Mastercraft Corp.*, 656 F.2d 11, 14 (2d Cir. 1981).[6]

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award to Eales on the basis that it constitutes forbidden double damages.

[5] *May v. Watt*, 822 F.2d 896 (9th Cir. 1987), is not inconsistent. In that case we refused to award indirect profits because the plaintiff had been unable to provide an ascertainable figure for them. *Id.* at 901.

[6] For the same reason we do not discuss whether it would have been appropriate for the district judge to award only those profits directly attributable to the use of the plans. *See Frank II*, 886 F.2d at 1550. As Shotey and Environmental Lifestyles conceded at oral argument, the district judge was not obliged in any event to trace the degree to which the plans contributed to total profits in the absence of any error or proof on the issue by the defendants.

CONCLUSION

The judgment of the district court if AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDA D. EALES and EALES & ASSOCIATES, INC., Plaintiffs-Appellees, v. ENVIRONMENTAL LIFESTYLES, INC., an Arizona corporation; MICHAEL SHOTEY; et al., Defendants-Appellants.	No. 90-16455 DC No. CV-88-00651-RCB ORDER (Filed Jun. 1, 1992)

Before: POOLE, REINHARDT and FERNANDEZ, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Fed. R. App. P. 35(b), the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

CERTIFICATE OF DISCLOSURE

I, Michael Shotey, hereby certify as President of Environmental Lifestyles, Inc., that said corporation has no parent companies or subsidiaries.

/s/ Michael Shotey	8/31/92
Michael Shotey	Dated

No. 92-660

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ENVIRONMENTAL LIFESTYLES, INC., an Arizona corporation; MICHAEL SHOTEY,

Petitioners,

v.

LINDA EALES and EALES & ASSOCIATES, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did The Ninth Circuit Err In Affirming The District Court's Conclusion That Respondents' Plans Are Entitled To Copyright Protection And That Petitioners' Infringement Entitled Respondents To An Award Of Actual Damages And Profits?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

RESPONDENTS' STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 4

I. SUMMARY OF ARGUMENT 4

II. THE NINTH CIRCUIT HAS CORRECTLY APPLIED U.S. COPYRIGHT LAW TO THE FACTS OF THIS CASE 5

III. EALES' WORKING DRAWINGS ARE PROTECTED AND COPYRIGHTABLE PURSUANT TO 17 U.S.C. § 102(a)(5) 6

IV. THE NINTH CIRCUIT CORRECTLY UPHELD THE DISTRICT COURT'S AWARD OF EALES' ACTUAL DAMAGES AS WELL AS ENVIRONMENTAL LIFESTYLES/SHOTEY'S PROFITS DERIVED FROM THEIR UNAUTHORIZED COPYING AND USE OF EALES' PLAN 3 WORKING DRAWINGS 6

V. CERTIORARI IS INAPPLICABLE AS THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH 17 U.S.C. § 101, 102(a)(5) 8

VI. THIS COURT SHOULD DENY REVIEW AS THE ENTIRE ISSUE TURNS UPON A DETERMINATION OF WHETHER PETITIONER HAS ESTABLISHED THAT THE DISTRICT COURT'S FACTUAL FINDINGS ARE CLEARLY ERRONEOUS 8

CONCLUSION 9

APPENDIX A-1

TABLE OF AUTHORITIES

Page

CASES

Cooling Systems and Flexibles v. Stuart Radiator, Inc., 777 F.2d 485 (9th Cir. 1985) 5

Demetriades v. Kaufmann, 680 F.Supp. 658 (S.D. N.Y. 1988) 6

Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 512 n. 5 (9th Cir. 1985) 7

Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 886 F.2d 1545 (9th Cir. 1989) 7

Imperial Homes Corporation v. Lamont, 458 F.2d 895 (5th Cir. 1972) 6

McCulloch v. Albert E. Price, Inc., 823 F.2d 316 (9th Cir. 1987) 5

Robert R. Jones Assoc., Inc. v. Nino Homes, 858 F.2d 274 (6th Cir. 1988) 6

Sid & Marty Kroft Television, Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977) 5, 6

Stevens Linen Associates v. Mastercraft Corp., 656 F.2d 11 (2nd Cir. 1981) 7

Transgo, Inc. v. AJAC Transmission Parts Co., 768 P.2d 1001 (9th Cir. 1985) 7

RELEVANT STATUTES

17 U.S.C. § 101 ..... 4, 8

17 U.S.C. § 102(a)(5) 4, 6, 8

17 U.S.C. § 504(b) 1, 5, 6, 9

Architectural Works Protection Act of 1990, Pub.L.No. 101-650, 104 Stat. 5089, Title VII 4, 8

No. 92-660

In The

Supreme Court of the United States

October Term, 1992

ENVIRONMENTAL LIFESTYLES, INC., an Arizona corporation; MICHAEL SHOTEY,

Petitioners,

v.

LINDA EALES and EALES & ASSOCIATES, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

Respondents, Linda D. Eales and Eales & Associates, Inc., an Arizona corporation, hereby request the Court deny the Petition for Writ of Certiorari to review the Judgment of the Ninth Circuit Court of Appeals. The Ninth Circuit Court has correctly applied U.S. Copyright law and properly concluded Respondents' plans were entitled to copyright protection. In addition, the Court correctly affirmed the District Court's award of compensatory damages and infringer's profits pursuant to 17 U.S.C. § 504(b).

OPINIONS BELOW

The Ninth Circuit's opinion was published on March 5, 1992. Its Order filed June 1, 1992 unanimously denied the Petition for Rehearing and rejected the suggestion for rehearing *en banc*.

RESPONDENTS' STATEMENT OF THE CASE

Respondent, Eales & Associates, Inc./Linda Eales (hereinafter "Eales") was retained by Wen-Clay, a developer of a project known as The Greens at Gainey Ranch to determine whether architectural drawings previously prepared by Corbin Yamafuji (hereinafter "C.Y.") conformed to the Scottsdale Building Code and could be adopted to Arizona use. Following inspection of the building site, and an examination of the C.Y. plans, Eales concluded the plans were unsuitable for Arizona for a variety of reasons. The C.Y. plans were based on California earthquake standards, failed to include air conditioning returns, had roof beams going through the windows, and serious deficiencies. The C.Y. drawings were unworkable, impractical and cost-prohibitive for Arizona construction.

Eales was subsequently retained by Wen-Clay to prepare construction (working) drawings for all the various model homes at The Greens at Gainey Ranch. Wen-Clay and Eales entered into an agreement where Eales specifically retained ownership in the construction drawings and in which the parties agreed that plans could not be assigned without Eales' consent. Eales returned the C.Y. drawings to Wen-Clay and created her own drawings

which were compatible with the status of the then existing models. After Eales' completion of the plans, they were submitted to the City of Scottsdale for a building permit. The City concluded they differed sufficiently from the C.Y. plans to require a full on-site plan check. The City issued the building permit for The Greens development.

During the Fall of 1986, Wen-Clay's financial problems required it to cease construction of the project. In May/June of 1986, Donald and Ann MacKenzie purchased Lot 156 of The Greens. They decided to build a No. 3 model on the site. Mr. MacKenzie had been negotiating with Shotey for the construction of a pool on the property and learned in November of 1986 that Shotey also had a contractor's license. Shotey had never constructed a home and his company, Environmental Lifestyles, Inc., was engaged in pool construction and landscape construction work at The Greens. Neither Environmental Lifestyles, Inc. nor Shotey ever asked Eales' permission to use her plans in constructing the MacKenzie home. Shotey, with the assistance of Dennis Legere who served as contractor superintendent, copied and used Eales' plans to construct the MacKenzie residence. Construction was completed in August of 1987.

On April 28, 1987, Eales wrote to Shotey and Environmental Lifestyles, Inc., among others, and informed them that her plans were being used without permission and demanded her usual fee of $4.00 per square foot for the 2,992 square foot custom home. None of the recipients of the letter responded to her invoice demanding her standard fee of $11,968.

Eales' copyright registration for her Plan 3 construction drawings became effective on November 6, 1987. When Shotey and Environmental Lifestyles, Inc. refused to respond to repeated demands, Respondents initiated the copyright infringement action.

The action was tried to the District Court which made detailed findings of fact and conclusions of law. On August 17th, the District Court for the District of Arizona entered Judgment in favor of Eales and awarded actual damages in the amount of $11,968 and profits of $45,250 for a total Judgment against Shotey/Environmental Lifestyles, Inc. of $57,218. The Ninth Circuit's March 5, 1992 Opinion affirmed the Judgment of the Trial Court. (App. A, Order of March 5, 1992). Subsequently, on June 1st, the Ninth Circuit denied Shotey/Environmental Lifestyles, Inc.'s Petition for Rehearing and rejected the suggestion for rehearing *en banc*. (App. A, Order of June 1, 1992).

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

The Ninth Circuit correctly concluded that Petitioner Shotey failed to establish that the District Court's factual findings and calculations of damages were clearly erroneous. The Court applied well-settled copyright law in concluding that Eales' architectural drawings and plans were eligible for protection under 17 U.S.C. § 101, 102(a)(5). The Court also correctly concluded that the Architectural Works Protection Act of 1990, Pub.L. No. 101-650, 104 Stat. 5089, Title VII, did not affect the prior law's protection of architectural plans.

In concluding that Eales' plans were entitled to copyright protection, the Ninth Circuit correctly followed well settled copyright law in affirming the District Court's conclusion that Eales' Plan 3 working drawings were her own independent creation and satisfied the originality requirement. *Sid & Marty Kroft Television, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977).

Finally, the Ninth Circuit properly applied the provisions of 17 U.S.C. § 504(b) in affirming the District Court's award of damages which included the fair market value of Eales' architectural plans as well as all profits which were attributable to the Petitioner's infringement of Eales' copyright.

II. THE NINTH CIRCUIT HAS CORRECTLY APPLIED U.S. COPYRIGHT LAW TO THE FACTS OF THIS CASE

The issue of "substantial similarity" in a copyright infringement claim is controlled by the clearly erroneous standard of review. *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 318 (9th Cir. 1987); *Cooling Systems and Flexibles v. Stuart Radiator, Inc.*, 777 F.2d 485, 487 (9th Cir. 1985). The Ninth Circuit correctly concluded that the Petitioner had failed to demonstrate that the District Court's factual findings and calculations of damages were clearly erroneous. In fact, Petitioner has failed to ever contend that any of the District Court's findings were unsupported by the evidence.

III. EALES' WORKING DRAWINGS ARE PROTECTED AND COPYRIGHTABLE PURSUANT TO 17 U.S.C. § 102(a)(5)

Section 102(a)(5) of the Copyright Act, 17 U.S.C., establishes that copyright protection will be afforded to original works of authorship of pictorial, graphic and sculptural works. It is well settled that this section includes construction working drawings such as the Plan 3 working drawings prepared by Respondent Eales. *See, Imperial Homes Corporation v. Lamont*, 458 F.2d 895 (5th Cir. 1972); *Robert R. Jones Assoc., Inc. v. Nino Homes*, 858 F.2d 274 (6th Cir. 1988); *Demetriades v. Kaufmann*, 680 F.Supp. 658 (S.D. N.Y. 1988).

The Ninth Circuit correctly concluded that the originality requirement is met when the work is the result of independent creation. *Sid & Marty Kroft Television, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977). It is undisputed that Eales did not copy the C.Y. plans and that she created drawing the Plan 3 model home without utilization of C.Y.'s drawings. Thus, the Ninth Circuit properly found the requisite originality necessary to support a copyright claim.

IV. THE NINTH CIRCUIT CORRECTLY UPHELD THE DISTRICT COURT'S AWARD OF EALES' ACTUAL DAMAGES AS WELL AS ENVIRONMENTAL LIFESTYLES/SHOTEY'S PROFITS DERIVED FROM THEIR UNAUTHORIZED COPYING AND USE OF EALES' PLAN 3 WORKING DRAWINGS

The Ninth Circuit correctly applied 17 U.S.C. § 504(b) in upholding the District Court's award of compensatory

damages as well as infringer's profits. *See, Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 512 n. 5 (9th Cir. 1985). The fair market value of Eales' architectural plans is measured by "what a willing buyer would have been reasonably required to pay a willing seller for her work." *Frank Music Corp.*, 772 F.2d at 512.

It was undisputed that the fair market value of Eales' Plan 3 working drawings was $11,968 and the District Court's finding was correctly affirmed by the Ninth Circuit. In addition to Eales' actual damages, she is also entitled to all profits attributable to the Petitioner's infringement. *See, Transgo, Inc. v. AJAC Transmission Parts Co.*, 768 F.2d 1001 (9th Cir. 1985). This includes any ascertainable indirect profits. *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1550 (9th Cir. 1989). In arriving at its figure, the District Court found that the purchase price of the residence was $201,750 and the cost of constructing the residence was $141,000. In addition, the District Court found that the construction manager, Legere was paid $12,500, plus 60% of the difference between $146,000 and the actual cost of the home if under that figure or $3,000 for a total of $15,500. Thus, the total cost of the residence was $156,500 resulting in a profit to Petitioners Environmental Lifestyles, Inc. and Shotey of $45,250.

The Ninth Circuit, affirming the District Court, correctly found Petitioner had failed to sustain its burden in establishing their deductible costs. The Court also correctly held any doubt as to the correctness of the profit calculation must be resolved in favor of Plaintiff. *See, Stevens Linen Associates v. Mastercraft Corp.*, 656 F.2d 11, 14 (2nd Cir. 1981).

V. CERTIORARI IS INAPPLICABLE AS THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH 17 U.S.C. §§ 101, 102(a)(5)

Petitioner relies exclusively on its erroneous contention that the Architectural Works Protection Act of 1990, Pub.L. No. 101-650, 104 Stat. 5089, Title VII, alters the prior protection afforded under 17 U.S.C. § 101, 102(a)(5). As set forth in the Ninth Circuit's Opinion, the "Act" has no effect on the protection of architectural plans or drawings. Moreover, the Ninth Circuit's decision is consistent with other circuits and districts which have uniformly held that architectural working drawings are entitled to copyright protection.

VI. THIS COURT SHOULD DENY REVIEW AS THE ENTIRE ISSUE TURNS UPON A DETERMINATION OF WHETHER PETITIONER HAS ESTABLISHED THAT THE DISTRICT COURT'S FACTUAL FINDINGS ARE CLEARLY ERRONEOUS

Even a cursory review of the record as well as the District Court's findings of fact, the pending Petition and the brief filed by the Petitioner before the Ninth Circuit reveals there exists no basis to conclude that any of the District Court's findings were not fully supported by the evidence.

The Ninth Circuit correctly applied well-settled law. Thus, the focus of the Ninth Circuit's inquiry on the District Court's decision turned on a determination of whether the District Court's factual findings were clear error. Since Petitioner has failed to make any showing

that any factual determination was clearly erroneous, this Court should decline review.

CONCLUSION

The Petition for Writ of Certiorari to review the Judgment of the Ninth Circuit Court of Appeals should be denied. The Ninth Circuit correctly held Eales Plan 3 working drawings were entitled to copyright protection. It also correctly implied 17 U.S.C. § 504(b) upholding the District Court's award of Eales' compensatory damages as well as the infringer's profits. The Ninth Circuit's decision was consistent with U.S. Copyright Law and further review is unwarranted.

RESPECTFULLY SUBMITTED this 27th day of October, 1992.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDA D. EALES and EALES & ASSOCIATES, INC., *Plaintiffs-Appellees,* v. ENVIRONMENTAL LIFESTYLES, INC., an Arizona Corporation; MICHAEL SHOTEY; et al., *Defendants-Appellants.*	No. 90-16455 D.C. No. CV-88-00651-RCB OPINION

Appeal from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge, Presiding

Argued and Submitted
November 7, 1991 – San Francisco, California

Filed March 5, 1992

Before: Cecil F. Poole, Stephen Reinhardt and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Poole

SUMMARY

Intellectual Property

Affirming a district court judgment, the court of appeals held that an architect's architectural home plans

were entitled to copyright protection, infringement of which warranted award of actual damages.

Linda D. Eales, an architect, entered into a contract for the preparation of architectural plans for a residential housing development. The contract stated that the plans could not be assigned without her permission. although the housing development failed, construction was completed using Eales' plans on a lot sold to third parties. Appellant Environmental Lifestyles, Inc., never contacted Eales to ask her permission to use her plans in the construction of this home. Eales' had effectively copyrighted the construction drawings used on that home. Eales brought an action for copyright infringement, seeking compensatory and punitive damages, and an injunction restraining further infringement. The district court entered judgment for Eales and awarded actual damages.

[1] The court rejected the argument that the architectural plans were not entitled to copyright protection because they lacked originality, were an unprotectable idea, or an unlawful derivation of a pre-existing work. [2] It is settled law that architectural drawings and plans are eligible for protection under the copyright code as material, graphic, or sculptural works. Eales' plans were no exception to this general rule. [3] The originality requirement does not demand that the author add novelty to the work, but that it be the result of independent creation. [4] while the copyright statutes do not allow an author to obtain a monopoly on an idea itself, an expression of an idea can be protected. Eales properly won damages because defendant copied the plans she drew, not the idea she created.

[5] Eales was entitled to the lost fair market value of the architectural plans. [6] She was also entitled to all profits attributable as the defendants' infringement of her copyright and to any ascertainable indirect profits she would have made on the house if she had sold it herself.

COUNSEL

Leighton P. Clark, Phoenix, Arizona, for the defendants-appellants.

John L. Dillingham, Dillingham, Keilp & Cross, Phoenix, Arizona, for the plaintiffs-appellees.

OPINION

POOLE, Circuit Judge:

Environmental Lifestyles, an Arizona real estate developer, and its officer Michael Shotey appeal a judgment in favor of the plaintiff, an architect, in this copyright infringement case. The defendants contend that the plaintiffs' architectural plans were not entitled to copyright protection and that even if they were the district court miscalculated actual damages and improperly awarded the plaintiffs lost profits. We affirm.

FACTS AND PROCEEDINGS

Wen-Clay, a homebuilding and real estate developer, hired the California architectural firm of Corbin, Yamafuji and Associates (CY) to prepare construction plans and drawings for model homes and homes for resale, both to

be built at a development called "The Greens" near the Gainey Ranch area of Scottsdale, Arizona. After CY prepared a set of plans, Wen-Clay obtained a building permit for the construction of the homes from the Scottsdale government. CY's plans, however, were designed for construction of homes in California: the plans included features that would make the homes more likely to withstand earthquakes, and there were other indicators that CY did not draw the plans with the idea of building in Arizona in mind. Accordingly, a Wen-Clay executive contact plaintiff Linda Eales, an architect and designer, and inquired about adapting the plans for use in Arizona. Wen-Clay was concerned that the plans would entail excessively high building costs and wanted to be sure that the plans conformed to the Scottsdale building code.

Eales, who during this time operated as both a sole proprietor and then in the corporate form as Eales & Associates, Inc., inspected the Greens building site with representatives of Wen-Clay. Model homes had been started on the site, but only one had partially constructed walls and none had been constructed beyond slabs and footings. After concluding that the CY plans were not compatible with Wen-Clay's desire to construct homes compatible with the Arizona climate and its own architectural style preferences, Eales reported that the plans would have to be changed. Wen-Clay accordingly stopped construction on the model homes so that it could review the plans. Shortly thereafter, Wen-Clay retained Eales to prepare construction drawings for all of the model homes at the Greens.

Eales specifically retained ownership in the construction drawings when she agreed to prepare them for Wen-

Clay's use and agreed with Wen-Clay in the contract that the plans could not be assigned without her permission. However, she did not seek the permission of CY to use its plans in constructing the homes at the Greens site. Instead, Eales returned the CY drawings to Wen-Clay and prepared her own construction drawings based upon a temporary Wen-Clay construction brochure and the necessity for creating plans compatible with the existing "footprints" of the then-existing models, including slabs, footings, elevator shafts, location of rooms and garages, and plumbing systems.

After completing these revised plans, Eales submitted them to the City of Scottsdale for a building permit. The city concluded that they differed sufficiently from the CY plan to require a full, on-site plan check. The city eventually issued the required building permit for the Greens development. During the fall of 1986, however, Wen-Clay's financial problems induced it to half construction of the Greens development.

In May or June 1986, Donald and Anne MacKenzie bought lot 156 at the Greens development and decided several months later that they desired plan #3 to be built upon the site. Mr. MacKenzie had been negotiating with defendant Shotey for the construction of a pool on the property and discovered in November 1986 that Shotey had a contractor's license. Shotey had a contractor's license. Shotey had never before constructed a home. Shotey's company, defendant Environmental Lifestyles, Inc., was engaged in pool construction and landscape construction work at the Greens. Nevertheless, MacKenzie began discussing with Shotey the possibility that Shotey would build the home since Wen-Clay was no

longer in business.[1] On January 26, 1987, MacKenzie and Shotey agreed that Shotey would build a house conforming to plan #3 on lot 156.

Dennis Legere, a construction supervisor in Wen-Clay's employ for several years, was familiar with Eales' construction drawings. He had built several homes based upon such plans in the past and had used them regularly in building the model homes at the Greens development. He also knew that the CY plans, which he had seen, were not sufficient to construct any of the models. Legere contracted with Shotey and Environmental Lifestyles to become construction superintendent on the MacKenzie project on lot 156 in February 1987. Construction was completed in August of that year.

Neither Wen-Clay, Environmental Lifestyles, Shotey, Legere or MacKenzie ever contacted Eales to ask for permission to use her plans in constructing the MacKenzie home. Eales discovered that her plans were being used in the construction at lot 156 after hearing Shotey describe the home and confronting Legere at the construction site. Shotey, Environmental Lifestyles, and Legere, however, all knew that Eales' plans for model #3

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[1] Defendant Michael Shotey contends that he sought repayment of money owed him by Wen-Clay, and that to settle this debt he agreed orally with Wen-Clay executive Roy Wensel to accept the Eales plans for model #3 at the Greens site as full satisfaction. However, the district judge concluded that "there is a serious question whether any such agreement ever existed" and that Shotey "had no reason to need [the Eales construction] plan" at the time he allegedly settled the Wen-Clay debt in this manner. Appellants E.R. at 92 (Findings of Fact at 6, Number 22).

were being used to build a home on lot 156. In fact, Legere sent a letter to the Scottsdale building department informing them that Wen-Clay had given Environmental Lifestyles permission to use plan #3 in building the lot 156 house. Eales' plans for model #3 had been machine copied by Environmental Lifestyles vice-president Kurt Dobson, Shotey, or Legere, but the title block (a margin space on the plan drawings indentifying [sic] the architect) had been removed.

On April 28, 1987 Eales wrote to Shotey, Environmental Lifestyles, Legere and Mr. MacKenzie's company, Mac-West Investments, Inc. informing them that the plans were being used without her permission and demanding her usual fee of $4.00 per square foot for a custom home together with an invoice for $11,968.00, which would be the resulting fee for the 2,992-foot MacKenzie home. None of the recipients of the letter responded to it.

On November 6, 1987 Eales' copyright registration for the plan #3 construction drawings became effective. Eales had never publicly distributed her plan #3 working drawings and took all necessary steps to inform Environmental Lifestyles, Shotey, Mac-West, and Legere of her ownership interest in the plans. The CY plans which had initially been commissioned by Wen-Clay for use at the Greens development were apparently never copyrighted. Shotey, Environmental Lifestyles and Legere all were aware of Eales' copyright claim on the plan #3 drawings before they commenced construction on the MacKenzie home.

MacKenzie paid $201,750 for the home on lot 156. The cost of constructing the home was $141,000 and

Legere was paid $12,500 plus 60% of the difference between $146,000 and the actual cost of the home if under that figure, or $3,000, for a total of $15,500. Legere's fee was not included in the cost of constructing the home; accordingly, the total cost of the residence was $156,500. Environmental Lifestyles and Shotey thus earned $45,250 profit on the construction of the MacKenzie home.

Eales sued Environmental Lifestyles, Shotey, Legere, and MacKenzie for copyright infringement on April 28, 1988. She sought compensatory and punitive damages and an injunction restraining further infringement. On August 17, 1990, the district court for the District of Arizona, after a bench trial, entered judgment in favor of Eales and awarded her actual damages of $11,968 and profits of $45,250, for a total sum of $57,218. The court held that Legere was entitled to indemnification from Environmental Lifestyles and Shotey for $11,968 in damages and ruled that MacKenzie was not liable for any damages suffered by Eales, Shotey and Environmental Lifestyles timely appealed.

STANDARD OF REVIEW

The factual findings that underlie the district judge's conclusions of law are reviewed for clear error. *McCullough v. Price*, 823 F.2d 316, 318 (9th Cir. 1987). The district court's calculation of damages is also subject to clear error review. *Abend v. MCA, Inc.*, 868 F.2d 1465, 1480 (9th Cir. 1988), *aff'd*, 110 S.Ct. 1750 (1990). This court has jurisdiction pursuant to 28 U.S.C. § 1291.

DISCUSSION

[1] Defendants Shotey and Environmental Lifestyles contend that the district court improperly found copyright protection for Eales' construction plans. They assert as grounds for this assertion that Eales' plans lack originality, are an unprotectable idea, and constituted an unlawful derivation of a pre-existing work. None of these arguments are meritorious. Shotey and Environmental Lifestyles also contend that the district judge incorrectly calculated damages. This contention is also without foundation.

I. Validity of Eales' Copyright

A. Originality

In order to properly receive copyright protection, Eales' drawings must be original. *United States v. Hamilton*, 583 F.2d 448, 450 and n.2 (9th Cir. 1978). Defendants argue that this requirement is not met because Eales' plans fit under the copyright code's "useful article" exception and do not substantially differ from the earlier drawings prepared by CY. Both of these arguments are meritless.

[2] The "useful article" exception of the copyright code would prevent Eales from copyrighting her plans if they "hav[e] an intrinsic utilitarian function that [does] not merely . . . portray the appearance of the article or . . . convey information." 17 U.S.C. § 101; *see Mazer v. Stein*, 347 U.S. 201, 218 (1954). The intrinsic function of an architectural plan is to convey the information necessary to enable the reader to construct a building. It is settled

law that architectural drawings and plans are thus eligible for protection under the copyright code as "pictorial, graphic, [or] sculptural works." 17 U.S.C. §§ 101, 102(a)(5); *see, e.g., Robert R. Jones Assoc. v. Nino Homes*, 858 F.2d 274 (6th Cir. 1988); *Imperial Homes Corp. v. Lamont*, 458 F.2d 895 (5th Cir. 1972); *Demetriades v. Kaufman*, 680 F. Supp. 658 (S.D.N.Y. 1988). Eales' plans are no exception to this general rule.[2]

[3] Defendants' assertion that Eales' plans do not qualify for copyright protection because they are "substantially similar" to the drawings prepared by CY is also unpersuasive. The originality requirement does not demand that the author add "novelty" to the work; it requires only that the plans "display something irreducible, which is one man's alone, not that the work be novel in comparison with the works of others." *Hamilton*, 583 F.2d at 451 (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903)). The originality requirement is met when the work is the result of independent creation. *Sid & Marty Krofft Television, Inc. v. McDonalds Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977). The defendants, do not dispute that Eales did not copy the CY plans and that she created the layout of the model home without consulting the CY drawings.

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[2] Because this case involves a claim of infringement of copyrighted plans, not a structure, the Architectural Works Protection Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 Title VII is inapplicable. *See* 1 *Nimmer on Copyright* § 2.08[D][2], at 2. 114 n. 163.4 ("The Architectural Works Protection Act . . . does not affect protection for architectural plans, drawings and models as pictorial, graphic, or sculptural works.").

B. The "Idea-Expression" Distinction

[4] Defendants next argue that Eales' plans do not qualify for copyright protection because they are an unprotectable idea. This argument is also meritless. While the copyright statutes do not allow an author to obtain a monopoly on an idea itself, an *expression* of an idea can be protected. *See Baker v. Selden,* 101 U.S. (11 Otto.) 99 (1879). Eales' plans laid out the location and sizes of numerous features of model home #3, and thus her ideas was "fixed" in tangible form. That is all the copyright code requires. *See* 17 U.S.C. § 102(a); *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1463 (5th Cir. 1990) ("[P]rotection is extended to an expression of an idea fixed in tangible form, but not to the idea itself regardless of the form in which it is fixed."). Eales won damages because defendants copied the plans she drew, not the idea she created.

II. Damages

Defendants argue that the district judge improperly calculated the damages and profits awarded Eales. This contention lacks merit. The copyright code allows the award of compensatory damages and infringer's profits. 17 U.S.C. § 504(b); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 512 n.5 (9th Cir. 1985) (*Frank I*).

[5] Eales is entitled to the lost fair market value of the architectural plans. *See Frank I*, 772 F.2d at 512; *Nucor Corp. v. Tennessee Forging Steel Service, Inc.*, 513 F.2d 151, 153 n.3 (8th Cir. 1975). In calculating this figure, the court is to determine "what a willing buyer would have been

reasonably required to pay a willing seller for plaintiff's work." *Frank I*, 772 F.2d at 512. The district court properly applied this test, and substantial evidence supported the finding that Eales could have earned $11,968 by selling the plans. Defendants offer no evidence sufficient to cast doubt on this figure.[3]

[6] Eales is also entitled, to all profits attributable to the defendants' infringement of her copyright and to any ascertainable indirect profits. *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1550 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 1321 (190) (*Frank II*); *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1023 (9th Cir. 1985). In calculating the direct profits resulting from the defendents' [sic] infringing use of Eales' plans, the district judge correctly used as a measure the amount of profits Eales would have made on the house if she had sold it herself.[4] *See Russell v. Price*, 612 F.2d 1123, 1123

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[3] Specifically, Shotey and Environmental Lifestyles have not demonstrated that Eales' ordinary fee was not $4 per square feet or that the size of the finished MacKenzie home was not 2,992 square feet.

[4] 17 U.S.C. § 504(b) allows a copyright plaintiff to recover its actual damages and the profits earned as a result of an infringing use to the extent that they are "not taken into account in computing actual damages." This provision, which is designed to prevent a plaintiff from recovering twice for the same damages, bars a plaintiff from recovering in the form of damages the profits it could have made from selling the infringing item in competition with the infringer and the profits gained by the infringer from its use of the copyrighted item. *See, e.g., Abeshouse v. Ultragraphics, Inc.*, 754 F.2d 467, 470-71 (2d Cir. 1985); *Taylor v. Metrick*, 712 F.2d 1112, 1120 (7th Cir. 1983). Because Eales is not in the business of selling her services as a homebuilder, defendants cannot complain about the profit

(9th Cir. 1979) ("It is clear from a reading of the statute that the infringer's profits to which the copyright proprietor may be entitled consist of the . . . sale *profits from the infringing use of the plaintiff's work*. . . . ") (emphasis added); *Robert R. Jones Assoc. v. Nino Homes*, 858 F.2d 274, 281 (6th Cir. 1988); *see also, e.g., Aitken, Hazen et al. v. Empire Constr. Co.*, 542 F.Supp. 252, 262-63 (D. Neb. 1982) (awarding revenues lost when developer illegally copied architectural plans and profits earned when infringer used them to build an apartment complex).[5]

While the district judge's findings of fact do not indicate the basis for its conclusion as to the costs of constructing the home, it is the defendants' burden to prove up their deductible costs. *Transgo*, 768 F.2d at 1024. Any doubt as to the correctness of the profit calculation should therefore be resolved in favor of the plaintiff, *See Stevens Linen Assoc. v. Mastercraft Corp.*, 656 F.2d 11, 14 (2d Cir. 1981).[6]

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award to Eales on the basis that it constitutes forbidden double damages.

[5] *May v. Watt*, 822 F.2d 896 (9th Cir. 1987), is not inconsistent. In that case we refused to award indirect profits because the plaintiff had been unable to provide an ascertainable figure for them. *Id.* at 901.

[6] For the same reason we do not discuss whether it would have been appropriate for the district judge to award only those profits directly attributable to the use of the plans. *See Frank II*, 886 F.2d at 1550. As Shotey and Environmental Lifestyles conceded at oral argument, the district judge was not obliged in any event to trace the degree to which the plans contributed to total profits in the absence of any error or proof on the issue by the defendants.

CONCLUSION

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDA D. EALES and EALES & ASSOCIATES, INC., Plaintiffs-Appellees, v. ENVIRONMENTAL LIFESTYLES, INC., an Arizona corporation, MICHAEL SHOTEY; et al., Defendants-Appellants.	No. 90-16455 DC No. CV-88-00651-RCB ORDER (Filed Jun. 1, 1992)

Before: POOLE, REINHARDT and FERNANDEZ, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Fed. R. App. P. 35(b), the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.